

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

THE DOVER HISTORICAL SOCIETY,)
HENRY R. HORSEY, HOLLY)
JOHNSON and CHARLES JOHNSON,) C.A. No. 03A-06-002 WLW
)
Petitioners,)
)
v.)
)
CITY OF DOVER PLANNING)
COMMISSION, consisting of JOHN)
FRIEDMAN, CAROL H. YOUNG,)
MICHAEL VON REIDER, WILLIAM J.)
DiMONDI, THOMAS HOLT, FRED)
TOLBERT, ROBERT D. WELSH,)
FRANCIS WINSLEY and FRANCIS C.)
NICHOLS and YOUNG & MALMBERG,)
P.A., and YOZIMA, L.L.C.,)
)
Respondents.)

THE FRIENDS OF OLD DOVER, INC.,)
HENRY R. HORSEY, HOLLY)
JOHNSON and CHARLES JOHNSON,) C.A. No. 05A-07-001 WLW
)
Petitioners,)
)
v.)
)
CITY OF DOVER PLANNING)
COMMISSION, YOUNG &)
MALMBERG, P.A., and YOZIMA,)
L.L.C.,)
)
Respondents.)

Submitted: February 27, 2007

Decided: June 4, 2007

Revised: June 14, 2007

ORDER

Upon Petitioners' Second Application for Attorneys Fees.
Granted.

Michael J. Maimone, Esquire of Edwards Angell Palmer & Dodge, LLP and Grover C. Brown, Esquire of Gordon, Fournaris & Mammarella, P.A., Wilmington, Delaware, attorneys for the Petitioners.

William W. Pepper, Sr., Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware, attorneys for City of Dover Planning Commission.

William E. Manning, Esquire of Buchanan Ingersoll & Rooney, P.C., Wilmington, Delaware; attorneys for Young & Malmberg, P.A. and Yozima, L.L.C.

WITHAM, R.J.

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In light of the recent submission of the City of Dover Planning Commission and its individual Commission members, the Court will revise its Order of June 4, 2007, to reflect the specific parties responsible for the appropriate attorneys' fees to be awarded Petitioners¹ for their second fee application.

FACTS

This case originally arises out of the proposed construction of a new three-story office building in the Dover Green Historic District. As the City of Dover Code requires, the Developers² sought from the Dover Planning Commission ("DPC") an architectural review certificate that would grant the Developers permission to construct the building. Under the Dover Code, an application for an architectural review certificate must be referred initially to the Historic District Commission ("HDC") for deliberation and a recommendation. In January of 2003, the HDC recommended that the certificate be awarded. Following the HDC's recommendation, the DPC approved the issuance of the certificate.

On June 18, 2003, Petitioners applied for *certiorari* to obtain this Court's

¹ Petitioners are The Friends of Old Dover, Inc., The Dover Historical Society, Henry R. Horsey, and Holly and Charles Johnson. Respondents in this action specifically referred to are Young & Malmberg, P.A., and Yozima, L.L.C. Except as otherwise noted, the parties will be referred to collectively as Petitioners and Respondents throughout this Opinion.

² Young & Malmberg, P.A. and Yozima, L.L.C.

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review of the DPC's decision.³ Initially, this Court dismissed the June, 2003 Petition due to lack of standing. The Supreme Court reversed, finding that the Petitioners had standing to challenge subdivision decisions in the historic district.⁴ Thereafter, this Court remanded the matter to the DPC for further proceedings.⁵ On remand, the DPC again granted the approval.

Following the DPC's re-approval, Petitioners applied to the Superior Court for an award of attorney's fees. In the fee application, Petitioners also challenged the DPC's re-approved plan. On June 20, 2005, this Court denied Petitioners' application for fees, and ordered Petitioners to file a new petition if they sought to challenge the second DPC decision. Petitioners immediately appealed this Court's ruling on the fee application.

Adhering to this Court's June 20, 2005 ruling, the Petitioners filed a second petition in this Court seeking review of the DPC's issuance of the architectural review certificate. That petition was filed on July 7, 2005.⁶ Upon receipt of the July, 2005 petition, an angry and impatient Michael Zimmerman ("Mr. Zimmerman"), principal of Respondent Yozima, L.L.C., climbed into a trackhoe (a popular and effective piece

³ Petitioners' first petition will hereinafter be referred to as the "June, 2003 petition."

⁴ *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1116 (Del. 2003).

⁵ *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 2004 Del. Super. LEXIS 253.

⁶ Petitioners' second petition will hereinafter be referred to as the "July, 2005 petition."

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of construction equipment) and demolished three of the four historic structures that were subject of the June, 2003 and July, 2005 petitions. In response, the City of Dover revoked the architectural review certificate previously granted to Respondents Young & Malmberg, P.A. and Yozima, L.L.C. and assessed a \$68,000 fine.

Petitioners then filed a second application for attorneys' fees. On January 31, 2006, this Court denied Petitioners' second fee application by Order. That Order was the basis for Petitioners' second appeal. The Petitioners' two appeals were consolidated by the Supreme Court on April 23, 2006 and decided on July 10, 2006.⁷

On appeal, the Supreme Court affirmed this Court's denial of the Petitioners' first fee application. Specifically, the Court held that neither the common fund or corporate benefit exception to the American Rule⁸ applied to the circumstances of the case.

Thereafter, the Supreme Court reversed this Court's denial of Petitioners' second fee application. First, the Court addressed the Respondents' *res judicata* argument. The Supreme Court found that *res judicata* did not bar the Petitioners' second fee application, because the second fee application rested entirely upon facts that did not arise until after the first application had been denied, *i.e.*, Mr. Zimmerman's destruction of the historic buildings.

⁷ *Dover Historical Soc'y. v. City of Dover Planning Comm'n*, 902 A.2d 1084 (Del. 2006).

⁸ *Chrysler Corp. v. Dann*, 223 A.2d 384, 386 (Del. 1996) (The American Rule requires that "a litigant must, himself, defray the cost of being represented by counsel.")

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The Supreme Court then addressed the Petitioners' final claim, that their second fee application was meritorious under the bad faith exception to the American Rule. Noting that Delaware Courts have the power to shift attorneys' fees where a "losing party has 'acted in bad faith, vexatiously, wantonly or for oppressive reasons,'"⁹ the Supreme Court held that Mr. Zimmerman's improper conduct constituted bad faith that "manifestly" warranted a fee-shifting award.¹⁰

In concluding that fees should be awarded to Petitioners for their second fee application, the Supreme Court did not address the appropriateness of the amount of fees requested. In order to determine the appropriate attorneys' fees to be awarded, this Court requested a more detailed explanation of the fees and expenses requested by Petitioners in their second fee application.¹¹ Petitioners and Respondents have since filed their respective submissions.

DISCUSSION

⁹ *Dover Historical Soc'y.*, 902 A.2d at 1093 *citing Slawik v. State*, 480 A.2d 636, 639 n.5 (Del. 1984).

¹⁰ Interpreting prior decisions in which Delaware Courts discussed the bad faith exception, (*e.g.*, where parties unnecessarily prolonged or delayed litigation, falsified records, knowingly asserting frivolous claims, misled the court, altered testimony or changed a position on an issue), this Court concluded that the bad faith exception was limited to abusive litigation tactics. On appeal, the Supreme Court found this Court's construction of the bad faith exception "overly narrow," and broadened the exception to include conduct occurring outside the scope of traditional court proceedings.

¹¹ *Friends of Old Dover v. City of Dover*, C.A. No. 05A-07-001 WLW (November 28, 2006).

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The crux of the parties' dispute stems from the fact that fees and expenses sought in the Petitioners' first fee application, are also sought in the second fee application. Respondents contend that this Court should limit any fees and expenses granted pursuant to the Petitioners' second fee application to those fees and expenses not also included in the Petitioners' first fee application. To rephrase, Respondents maintain that Petitioners' fee award should be limited to fees and expenses incurred by Petitioners' in the prosecution of their July, 2005 petition, the petition that, as the Supreme Court described, "was the proverbial straw that broke the camel's back."¹² The Petitioners', on the other hand, argue that the Supreme Court's decision in no way limits the relief sought to fees and expenses incurred in connection with their July, 2005 petition. The Court agrees with the Petitioners.

Despite the Respondents' contention, it is irrelevant that the Petitioners' second fee application contains fees and expenses sought in the first fee application, *i.e.*, fees incurred in connection with the June, 2003 petition. The second fee application sought fees incurred by the Petitioners in connection with both the June, 2003, and

¹² The logic behind Respondents' argument is as follows: (a) the Supreme Court affirmed this Court's denial of the Petitioners' first fee application; (b) subsequently, the Court concluded that the Petitioners' second fee application was not barred *res judicata* and fees were appropriate under the bad faith exception to the American Rule; (c) since the fees and expenses contained in the first fee application were also contained entirely within the second application, the Supreme Court's ruling on the inapplicability of *res judicata* was only with respect to the portion of the second fee application that sought fees related to the Petitioners' July, 2005 petition, *i.e.*, fees and expenses related to Mr. Zimmerman's bad faith conduct.

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July, 2005 petitions based on a legal theory that did not exist at the time the first application was filed, Mr. Zimmerman's bad faith conduct.¹³ The Supreme Court did not find the Petitioners' first fee application meritorious; however, Mr. Zimmerman's conduct changed the factual scenario surrounding the second fee application and the reason for awarding the fees and expenses contained therein, including those incurred by the Petitioners in prosecution of their June, 2003 petition.

Mr. Zimmerman's extraordinarily offensive conduct resulted in the intentional destruction of the very subject matter that the Petitioners' sought to protect and preserve through both their June, 2003 and July, 2005 petitions. Mr. Zimmerman destroyed the historic buildings without regard to legal process. As a result, the Petitioners were deprived of the benefit earned when they successfully prosecuted their June, 2003 petition. Further, Mr. Zimmerman's conduct rendered moot the Petitioners' July, 2005 petition and deprived them of their legal right to fight for the preservation of the historic structures. As the Supreme Court noted, "[i]t is difficult to imagine conduct more abusive and disrespectful of the judicial process...."¹⁴

Therefore, the Court concludes that in addition to the fees and expenses incurred in connection with their July, 2005 petition, the Petitioners are entitled to

¹³ In concluding that *res judicata* did not bar the Petitioners' second fee application, the Supreme Court concluded that the second fee application rested entirely upon facts that did not arise until after the first application had been denied, *i.e.*, Mr. Zimmerman's bad faith.

¹⁴ *Dover Historical Soc'y.*, 902 A.2d at 1094.

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fees and expenses contained in the second fee application, which relate to their July, 2003 petition.

With respect to their second fee application, the Petitioners' have requested that this Court award \$161,341.00 in attorneys' fees¹⁵ and \$11,621.72 in expenses, disbursements and costs.¹⁶ Petitioners have provided a detailed billing statement reflecting 547.30 billable hours from April 28, 2003, until May 31, 2006. Also, Petitioners have provided statements detailing the expenses, disbursements and costs associated with the corresponding time frame.

Respondents argue that any fees awarded should be substantially less than those the Petitioners seek because the time spent by Petitioners' counsel is materially disproportionate to the time spent by Respondents' counsel.¹⁷ Although Petitioners have accumulated more billable hours over the course of litigation, Petitioners have

¹⁵ The fees break down as follows: 529.80 hours of attorney billable time at a discounted rate of \$300.00/hr, 6.10 hours of senior paralegal billable time at \$160.00/hr, and 11.4 hours of paralegal billable time at \$125.00/hr. This Court will not evaluate the discrepancies in hourly rates, since the rates charged are within the range of rates that would be expected by this Court.

¹⁶ Petitioners clarified an error in their submission and arrived at \$11,621.72 in expenses, disbursements and costs. The majority of these expenses, disbursements and costs involved outside copying services, outside binding services, outside delivery services and computerized legal research.

¹⁷ Respondents have provided a detailed billing summary reflecting 163.6 billable hours from September 2, 2003 through May, 31, 2006 in connection with this matter. At a discounted rate of \$240.00/hr, the attorneys' fees charged by Respondents during that time total \$39,119.39.

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supplied sufficient reasoning to explain away much of the discrepancy.¹⁸ Moreover, the Court finds that the hours billed by the Petitioners are reasonable.

Upon review of the record, it appears that Petitioners' have completed a substantial amount of work in an effort to protect and preserve the destroyed historic structures. This effort includes two petitions, three different appeals, a *writ of certiorari* and supporting briefs, numerous other motions, briefs and correspondence over a three-year period beginning in April of 2003. Consequently, a total of 547.30 billable hours is reasonable. Furthermore, Petitioners' charged a discounted hourly rate of \$300.00 for their work. Given the expertise of counsel, that rate is reasonable.

Therefore, Petitioners are awarded \$161,341.00 in attorneys' fees and \$11,621.72 in expenses, disbursements and costs. The Supreme Court concluded that Mr. Zimmerman's actions were attributable to both Yozima and Y&M;¹⁹ accordingly,

¹⁸ Respondents' counsel was not involved in the litigation until Petitioners had accumulated at least 60 billable hours. Further, Petitioners filed an opening and a reply brief (as well as an extensive appendix) in connection with the *writ of certiorari*, and Petitioners were required to reply to two different answering briefs, which were filed by two different law firms and which asserted different arguments. Petitioners drafted certain documents that Respondents were not required to draft (after Respondents demolished the structures). Petitioners drafted and filed a motion to consolidate the Supreme Court appeals and Petitioners drafted and filed two opening briefs on those consolidated appeals, because the Supreme Court had not granted the motion to consolidate until after the opening briefs were due. Petitioners were required to reply to two different answering briefs in the consolidated appeals, which were filed by two different law firms and which asserted different legal arguments.

¹⁹ *Dover Historical Soc'y.*, 902 A.2d at 1094 (The Supreme Court held that it was 'disingenuous for either Yozima or Y&M to contend that Mr. Zimmerman was not acting on their

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Respondents Yozima and Y&M are jointly and severally liable for the award.

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh
oc: Prothonotary
cc: Order Distribution
File

behalf at the time he forever altered Dover's Historic District.' In finding that Mr. Zimmerman's actions were attributable to both Yozima and Y&M, the Supreme Court noted that '(i) Mr. Zimmerman was the principal of Yozima; (ii) Y&M and Yozima owned the structures that Mr. Zimmerman destroyed; (iii) neither Yozima nor Y&M took any action against Mr. Zimmerman for his conduct; and (iv) Yozima and Y&M initially wanted to destroy those buildings but the HDC opposed their demolition.' Also, the Supreme Court found that Mr. Zimmerman was 'acting to advance an interest central to both Yozima and Y&M at the time of his bad faith conduct.')